Supreme Court, U.S.
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No. 05-744

**IN THE SUPREME COURT OF THE UNITED STATES**

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**PAUL SHUMPERT,**

***Petitioner,***

**v.**

**MANCOR, CAROLINA, INC.**

***Respondent.***

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTIONS PRESENTED

I. Where the Court finds that a Plaintiff has established a prima facie case of age discrimination at Summary Judgment, can the Court fail to find that an inference of age discrimination has been raised?

II. Where the Court finds that the record shows disparate treatment of an older worker as compared to a similarly situated younger worker, can the Court discount this finding of disparate treatment in determining whether the record presents facts sufficient to raise an inference of age discrimination?

III. Should the shifting burden test be used in a case, where the Defendant did not articulate a reason for having taken the particular adverse employment action at issue?

IV. Is evidence of disparate treatment evidence of pretext?

V. Can the Court still legitimately use the "pretext plus" standard for analysis of Civil Rights cases at Summary Judgment?

VI. **Is the fact that a particular supervisor (decision maker in an adverse employment action) had not taken overt action before the alleged adverse action, against an employee (Plaintiff) create, as a matter of law, the inference that the supervisor bore no unlawfully motivated animus against the Plaintiff?**

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## OPINIONS BELOW

The Court of Appeals wrote an unpublished Opinion in this case, affirming based on the reasoning in the District Court Judge's Order filed on January 27, 2005. A copy of the unpublished Opinion is included in the Appendix, as is the Order of January 27, 2005 by Judge Cameron McGowan Currie, United States District Court Judge.

## JURISDICTION

On September 13, 2005, the Appeals Court for the Fourth Circuit affirmed the District Court's dismissal of Mr. Shumpert's case on Summary Judgment. This Court Has Jurisdiction under 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS AT ISSUE

None.

## STATE STATUTORY PROVISIONS AT ISSUE

None.

## STATEMENT OF THE CASE

Mr. Shumpert began working for Mancor in November of 1995 as a quality inspector in a temporary position. He was selected for hire by Scott Laughead, then a supervisor in Quality inspection for Mancor. Dave Hollis, who was then the plant manager, approved the hire. At the time of his hire, he was sixty three years old. In 1996, Shumpert was laid off, as part of a reduction in force, but was later recalled to work for Mancor in 1997, returning to the position of quality inspector. He continued to work for Mancor in a permanent position until his termination on August 3, 1999. After Shumpert's recall, and prior to his termination, Hollis was replaced as plant manager by Dilip Teppara. Mr. Laughead was transferred to another department, and replaced with Duane Schnipke, who became Shumpert's supervisor several months prior to Shumpert's termination.

Shumpert was a good worker, while at Mancor, and was described as excellent by the plant manager, Mr. Teppara. Shumpert had good and cordial relationships with his supervisors.

Rodney Lloyd began working for Mancor in February of 1995. Lloyd was nick-named "Beaver," and is usually referred to by this name. In 1999, Lloyd was part of the Shipping Department at Mancor.

Mancor's plant produces steel parts. Shumpert would inspect the finished parts and

mark or "tag" them before Mr. Lloyd or another shipping worker would remove the part, either to the appropriate truck for shipping, or back to the line for more work (if the part did not pass inspection).Because of the fact that the shippers could not do their work until each part had been inspected, there was a natural antagonism between the quality inspector and the shipper. The shipper, of course, wanted the quality inspector to hurry up and tag the parts so that they could be moved, and the shipper could keep to the shipping schedules. The quality inspector wanted to take the time to do a thorough inspection, so he did not pass bad parts. Apparently, it was fairly common for quality inspectors and shippers working on the shifts to get into heated arguments over this type of thing.

In 1997, Lloyd was involved in an altercation with another employee, Melvin Sanders. The altercation involved Lloyd yelling profane statements and vulgarities at work. Sanders alleged that Lloyd had hit him during the altercation. Lloyd admitted to the battery when questioned by management. The Human Resources Manager, although Lloyd had admittedly hit another employee in anger, did not terminate Lloyd, but instead placed a disciplinary warning in Lloyd's file. The warning memorialized the incident, and stated that any further such behavior from Lloyd "would lead to termination." This was on May 14, 1997. About two months later, Mancor placed another note in Lloyd's file, which states, in describing Lloyd:

"volatile attitude (up/down) Selective dependability; manipulative; Fighting incident with Melvin; Open vulgarity ... Recommend – 90 day evaluation." Within a few months after this (late 1997), Lloyd was involved in another altercation, in which he threw a temporary worker against a wall. Rudy Blazek and Gerald McGee escorted the man (the temporary worker) from the premises. Lloyd was not terminated. Lloyd was later involved in yet another altercation, this time with a man named Caroll Watkins. Shumpert witnessed this altercation, which concluded with Lloyd leaving the scene before another physical altercation could erupt. A few months later, in April of 1998, in the presence of third a third party witness, who was a supervisor, David Count, Lloyd became involved in a heated exchange with Shumpert. Lloyd told Shumpert "I am not playing" while grabbing Shumpert's arm. Rather than terminating Lloyd (a supervisor had actually witnessed him attacking Shumpert), Mancor's management, Teppara, and the New HR Director had a conversation with Lloyd about his behavior, and submitted yet another written warning to his file.

Even after the incident during which Lloyd was actually observed physically assaulting Shumpert, Lloyd continued to physically abuse the much smaller and older Shumpert. (Lloyd outweighed Shumpert by more than a hundred pounds and was about a foot taller. He was also about twenty years Shumpert's junior). In one

instance, Lloyd grabbed Shumpert and physically removed him from a truck where he was working, then "roughed him around." Shumpert reported this attack to his supervisor, Duane Schnipke, Rudy Blazek, and to the HR director. Lloyd was not terminated, or disciplined in any way. Instead, Lloyd and Shumpert were ordered to go to their respective supervisors, rather than engage in arguments with one another.

In the late summer of 1999, after Shumpert had reported Lloyd's latest abuse, Shumpert's car received a long scratch down the side. Shumpert believed that Lloyd had done it, and reported this to Duane Schnipke, a supervisor. After Lloyd had clocked out for the day, one afternoon, Shumpert went to the door to watch Lloyd walk through the parking lot (to make sure that he did not scratch the car again. Lloyd came back to the plant and engaged in a verbal altercation with Shumpert. Shumpert called his supervisor, who intervened until Mr. Lloyd left the plant.

During the months prior to Shumpert's termination, Duane Schnipke, Shumpert's supervisor, asked Shumpert, on several occasions, when he would be retiring. Shumpert replied that he did not intend to retire any time soon.

On August 3, 2001, near the end of his shift, the Plaintiff found that he needed to move several pallets, which were hindering his access to his work area. He attempted to contact a shipper to move the pallets, but was unsuccessful. He then began to move the pallets himself. Lloyd approached the Plaintiff and began to yell

at him for moving the pallets. The Plaintiff then told Lloyd to go get his supervisor, as he had been instructed. Instead, Lloyd escalated his yelling, and grabbed the Plaintiff by his wrists, pushing the Plaintiff around, and restraining him, The Plaintiff yelled for his supervisor, Duane Schnipke, who was in his office. The Plaintiff also broke Mr. Lloyd's hold and struck out at him once, his blow glancing off of Mr. Lloyd's uniform, then struck out a second time, making contact with Mr. Lloyd's chest, and pushing Mr. Lloyd back, away from him. Schnipke was in his office, when he heard the Plaintiff and Lloyd yelling. He exited his office, which was only 25 feet from the altercation, and observed the Plaintiff striking Lloyd's chest. Lloyd is about six feet, and about 220 pounds. The Plaintiff is much shorter and lighter. Schnipke did not think that the Plaintiff was trying to knock Lloyd to the ground, Schnipke approached the two and separated them. The Plaintiff continued to demand that Schnipke get Lloyd away from him, emphatically. Schnipke stood between the two, but no farther scuffle ensued. Schnipke did not witness anything that had happened prior to the Plaintiffs striking Mr. Lloyd.

The Plant Manager, Dilip Teppara, also heard the ruckus, and, basically saw the same thing that Schnipke saw. He noted that both Lloyd and the Plaintiff were "yelling and screaming," though he could not make out what was being said. Schnipke and Teppara sent Lloyd to his office, and the Plaintiff back to his workstation. The Plaintiff notified both Schnipke and Teppara that he was defending himself against physical violence from

Lloyd. The Plaintiff asked to speak to Teppara, who assured him that he would talk to him about the situation. Lloyd was interviewed and asked to give "his side" of the story. Lloyd stated that he did not remember how it started. He admitted that he was arguing with the Plaintiff, and did not remember anything that was said. No one interviewed the Plaintiff. No one asked him for "his side" of the story. Though the Plaintiff had asked to speak with Mr. Teppara, the Plant manager, about the situation, and though Teppara did assure that Plaintiff that he would meet with him, he did not. Schnipke *was* aware of Lloyd's past history of repeated violence against co-workers, yet he did not consult Lloyd's file, He did not consult the Plaintiffs file. He was aware that there was a past history of physical aggression between the Plaintiff and Lloyd, in which, in each and every circumstance, Lloyd was the aggressor. Schnipke also recognized that Lloyd should have gone to his supervisor rather than continue to argue and escalate hostilities. Teppara was aware that there had been clashes between the Plaintiff and Lloyd in the past. He was aware of the car-keying incident, and had presided over the incident report and investigation involving Lloyd's grabbing the Plaintiff by the arm. However, he did not review either man's records. Without further investigation, Schnipke and Teppara terminated the Plaintiff. Schnipke typed up a letter and a statement concerning the termination. Teppara signed the statement and letter. This was all done before anyone spoke to the Plaintiff. Then Schnipke met with the Plaintiff and told him that he was

terminated. The Defendant did not impose any disciplinary measures against Mr. Lloyd. Mr. Lloyd was born in 1971.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. **THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE COURT MAY FIND THAT THERE IS NO INFERENCE OF DISCRIMINATORY INTENT IN A CASE WHERE THE SAME COURT RECOGNIZES THAT THE RECORD PRESENTS A PRIMA FACIE CASE OF AGE DISCRIMINATION.**

II. **THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER EVIDENCE OF DISPARATE TREATMENT BASED ON AGE IS EVIDENCE OF PRETEXT AS TO AN EMPLOYER'S ASSERTED REASON FOR TAKING AN ADVERSE EMPLOYMENT ACTION.**

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SHIFTING BURDEN TEST MAY BE APPLIED IN A CASE WHERE THE DEFENDANT/ EMPLOYER FAILS TO ASSERT A NON-DISCRIMINATORY REASON FOR HAVING TAKEN THE ADVERSE EMPLOYMENT ACTION AT ISSUE.

IV. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE "PRETEXT-PLUS" STANDARD CAN STILL BE APPLIED TO REVIEW OF AGE DISCRIMINATION CASES AT THE SUMMARY JUDGMENT STAGE.

V. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A FINDING THAT A DECISION MAKER HAD NOT TAKEN ADVERSE EMPLOYMENT ACTION AGAINST AN EMPLOYEE PRIOR TO A DISCRIMINATORY DECISION PROVES, AS A MATTER OF LAW, THAT THE SUPERVISOR BORE NO DISCRIMINATORY ANIMUS AGAINST THE EMPLOYEE.

Although Judge Currie reviewed this case de novo, after the parties' Objections to the Magistrate's Report and Recommendation, her Order adopts the findings and conclusions of the Magistrate's Report and Recommendation. Because the order here appealed incorporates the Report and Recommendation, the *de facto* findings and rulings appealed are found in the Magistrate's Report and Recommendation filed January 6, 2005.

## I. Where a Plaintiff in an ADEA case has established a prima facie case of age discrimination based on circumstantial evidence, he should, as a matter of law, be considered to have to presented evidence of age discrimination.

One can either use direct or circumstantial evidence to prove that age was a factor in an employer's decision to take adverse employment against a Plaintiff. Where the Plaintiff presents circumstantial evidence, the Courts have recognized certain elements which, if met, establish a prima facie case of discrimination, or which provide sufficient proof to establish a genuine issue of material fact as to whether the employer's motive was a prohibited one. Once a Plaintiff has established a prima facie case of age discrimination based on circumstantial evidence, the Plaintiff has, as a matter of law, established a genuine issue of material fact as to whether age

was a factor in his termination.

In the March 10th Report and Recommendation, the Magistrate Judge states clearly, that Plaintiff ***has*** established evidence to support a case for age discrimination:

> "However, Defendant argues that Plaintiff cannot establish a prima facie case because he cannot establish that his job performance was satisfactory, or that his discharge occurred under circumstances giving rise to a reasonable inference of unlawful discrimination. The undersigned does not agree."
>
> "Therefore, the undersigned finds for the purposes of summary judgment that Plaintiff has established all of then necessary elements for his prima facie case,"

In the Supplemental Report and Recommendation, the Magistrate Judge affirms this finding, and incorporates his March 10th Report and Recommendation, *in toto*, into the Supplemental Report and Recommendation. (App. 30) Without a doubt (the Magistrate Judge, the District Court Judge, and now the Fourth Circuit, by affirmation, concur), Shumpert **has established** that there are facts sufficient to create a genuine issue of material fact, as to whether Mancor's decision to terminate him was a result of disparate treatment based on consideration of his age. All a Plaintiff

needs do to in order to survive Summary Judgment is to establish a genuine issue of material fact as to whether age, as a factor, was the motive for his termination. He need only show a prima facie case of age discrimination, supported by facts in the record. If there is an inference to be drawn, it is to be drawn in favor of the non-moving party (Shumpert). Here, there is an inference to be drawn. If Shumpert is able to establish that he was terminated under certain circumstances (those set forth in Halperin v. Abacus Tech. Corp., 128F.3d 191, 20 n. 13 (4th Cir. 1997), and cited by the Magistrate as the applicable elements concerning a prima facie case of disparate treatment/ age discrimination).

The record in this case does contain a plethora of information showing that Lloyd, as a younger worker, was given warning after warning about physical violence towards Shumpert and other workers, but was never subjected to termination. One incident, at least, included a manger actually observing "Beaver" physically assaulting Shumpert. Yet Shumpert is terminated immediately, by a supervisor who, in the past few months had been asking him repeatedly when Shumpert planned to retire. Shumpert has, in fact, met his burden of establishing a prima facie case, and should survive Summary Judgment. How can the Magistrate find that Plaintiff has, in fact, established a prima facie case of age discrimination, including the fourth element "that his discharge occurred under circumstances that

raise a reasonable inference of unlawful discrimination," (See Halperin) and then find that, despite the establishment of a prima facie case of discrimination, no reasonable juror could possibly find that such an inference has actually been raised? The Appellant respectfully argues that this can not, logically, be done.

**II. The Trial Court erred in finding that there was no evidence of discriminatory animus other than evidence of disparate treatment, and then erred in finding that evidence of disparate treatment does not present a genuine issue of material fact as to an employer's discriminatory motive for termination.**

The Magistrate, on pages 7-8 of the March 10th Report and Recommendation (App. 8-10), finds that Shumpert has, in fact, established that he was the victim of disparate treatment, in that Lloyd was treated more favorably than the Shumpert without sufficient legitimate reason. The Magistrate then indicates that he finds that Shumpert has set forth no *other* evidence to support a claim that age was a factor considered in Mancor's decision to terminate Shumpert. However, Shumpert did testify that his supervisor, Mr. Blazek, gave notice that he was going to retire about three months before Shumpert's termination. Blazek's retirement date was about three weeks before Shumpert's termination. After

Blazek had said he wanted to retire, Schnipke, who as Shumpert's new supervisor (or the one over Blazek) persisted in asking Shumpert constantly (twice a week over about three months) whether Shumpert was planning to retire too. Each time Shumpert told Blazek that he was not planning to retire. Blazek would continue to press, up until the termination, in which Blazek was, in fact, a decision maker. Shumpert's affidavit on this point was filed on October 16, 2001. The record, therefore, not only presents evidence of disparate treatment, but also a series of constant comments over three months (about 24 comments at the rate of two per week) from a decision maker, which indicated that Mancor, or at least Schnipke, wanted Shumpert to resign (retire)because of Shumpert's advanced age.

The Magistrate, and, by incorporation, the U.S. District Court Judge, state that evidence of disparate treatment, alone, is not enough to prove discriminatory intent. This is simply not so. The Judge weighs evidence and draws inferences in favor of the moving party, counter to the mandate from Barnyard v. Malone, 268, F.3d 228, 234 (4th Cir. 2001). And Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Trial Court concluded that, although Schnipke and Teppara were aware of Lloyd's violent past history, and his history of violent attacks initiated against Shumpert, Mancor simply made a mistake, or was unfair, in terminating Shumpert while taking no action whatsoever against Lloyd for the same, or,

actually, more serious offenses. (App. 12-13) This is granting a ***major*** inference to the ***moving*** party. If Mancor has been unfair to Shumpert, and did subject him to disparate discipline, without any explanation, then the correct inference to be drawn would be one for Shumpert, as the non-moving, party, not against him. In fact, this type of evidence, alone, can satisfy or at least strongly buttress the last element of a prima facie case in a discrimination claim (a reasonable inference of discriminatory motive). *See* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141-143 (2000); see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 n.4 (1993). "Rejection of the Defendant's proffered reasons is enough at law to sustain a finding of intentional discrimination."

One means of demonstrating pretext is to put forth evidence that employees outside the protected class who were involved in misconduct of comparable seriousness were not subject to similar adverse employment action. Hiatt v. Rockwell Int'l Corp., 26 F.3d 761, 770 (7th Cir. 1994). The record clearly shows that Shumpert has, in fact, done that here. The Trial Court agrees (see page 7 of the Magistrate's R&R) "Considered in the light most favorable to the Plaintiff, a reasonable fact finder could construe these facts as evidence that a similarly situated employee from outside of Plaintiff's protected class received more favorable treatment." (App. 8-9) Thus, not only does the record present evidence which supports a finding of pretext, as a matter of law, but the

finding of pretext, in fact, supports a finding that an inference of discriminatory motive can be drawn from the facts. The fourth element in the prima facie case, as cited by the Magistrate in his Report and Recommendation, is "(4) that his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. Halperin v. Abacus Tech. Corp., 128 F.3d 191, 200 n. 13 (4th Cir. 1997)" (JA 68) The Magistrate and the U.S. District Court Judge *both* found that that very thing was already proven on page 8 of the March 10th Report and Recommendation (JA 71), but then find that the very same element has no support whatsoever in the record, on page 13 (JA 76) of the ***same*** document.

## III. The Record, and the Court's own findings, provide proof that Mancor's proffered reason for terminating Shumpert is pretextual.

### A. The shifting burden test should never have been used in this case, as Mancor did not articulate a reason for having terminated Shumpert, rather than subjecting him to a warning, as had been given to younger workers.

Although Mancor states that it terminated Shumpert for inappropriate behavior (striking Lloyd), Mancor has never actually given a

non-discriminatory reason for having failed to subject Shumpert to a warning or reprimand for his first-ever reported physical altercation in the workplace rather than terminating him. There is no explanation for why Shumpert, as an older worker, had be terminated for the very first physical altercation he had ever been engaged in at work (and against a man who outweighed him by over a hundred pounds, and had almost a foot of height on him), while a younger worker (Lloyd) was not terminated for his first (or second, or third, or fourth) violent attacks on co-workers (even where the attacks had been observed, first hand, and against Shumpert, by management). Because Mancor never asserted any non-discriminatory reason for this disparate treatment, it failed to meet its burden of production under the shifting burden test. The Court should not even have analyzed this case under the Shifting Burden test as to the disparate treatment claim.

### B. The Court found that Mancor engaged in disparate treatment against Shumpert, and disparate treatment is evidence of pretext.

As noted above, the Magistrate, and, by incorporation, the U.S. District Court Judge did, in fact, find that Shumpert had established disparate treatment, and that, at the very least, Mancor was unfair in terminating Shumpert and not disciplining Lloyd at all. Under Hiatt v. Rockwell

Int'l Corp., 26 F.3d 761, 770 (7th Cir. 1994)., this is evidence sufficient to establish pretext. It is undisputed that Lloyd had been both observed first-hand doing violence to other workers, including Shumpert, by management, and had been the subject of multiple reports of having committed violent acts (and one act of property destruction) against other employees, including but not limited to the Shumpert. Lloyd was clearly the beneficiary of multiple warnings (or having his actions simply ignored), rather than termination. Although Mancor says it terminated Shumpert and not Lloyd in response to the last altercation at issue because Teppara and Schnipke saw Shumpert hit Lloyd and did not see Lloyd's preceding attack upon Shumpert, Mancor has never asserted any explanation as to why Shumpert was not simply disciplined by a warning, as Lloyd had been on many other occasions, including one during which he violently grabbed the Shumpert in a supervisor's presence. If, as Mancor implies, there is a "zero tolerance" policy for physical altercations in the workplace, and it is enforced only against an older employee, and not against a younger employee, especially, in this case, where Lloyd has clearly had many more incidents on his record than Shumpert, there is evidence from which a reasonable jury could find that Mancor engaged in disparate treatment.

One means of demonstrating pretext is to put forth evidence that employees outside the

protected class who were involved in misconduct of comparable seriousness were not subject to the same or similar adverse employment actions. Hiatt v. Rockwell Int'l Corp., 26 F.3d 761, 770 (7th Cir. 1994). Thus, not only was the shifting burden test not properly applied, the Court erred in finding that there was no evidence (no genuine issue of material fact) as to pretext.

## IV. The District Court erred in applying a "pretext-plus" standard.

The Magistrate and the U.S. District Court Judge, in this case, have reverted to using the "pretext-plus" standard in this case. They find that the Plaintiff has, in fact, established a prima facie case of age discrimination. They find that Mancor's grounds for termination are flawed, and, in fact, constitute disparate treatment. Then, they state that, despite Shumpert's having met all these burdens, there just is not enough evidence to convince a reasonable juror that age had anything to do with the decision to terminate him. This analysis is the same as the antiquated "pretext-plus" requirement, which was rejected by the United States Supreme Court in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141-143 (2000).

The Court seems to rely on Halperin v. Abacus Tech. Corp., 128 F.3d 191, 196 (4th Cir. 1997), stating that, where the Defendant articulates a non-discriminatory reason for an

adverse employment action, the Plaintiff must, in addition to showing that the reason asserted is pretextual, *then bear the burden of proving*, that he was the victim of intentional discrimination. This implies that, to overcome the articulated reason for termination, the Plaintiff must do more than show that there is a genuine issue of material fact as to whether the articulated non-discriminatory reason for the adverse employment action is pretextual. This burden, in the late 1990's, was known as "pretext-plus," and is a thing of the past.

The controversy over what kind of *evidentiary showing was required to surmount* the obstacle of "pretext plus" was put to rest by the United States Supreme Court in 2000. In the decision of Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141-143 (2000)., the Court clearly relegated "pretext-plus" to the scrap heap. Justice O'Connor, in her well written opinion, states "Prima facie case and sufficient evidence of pretext may permit the trier of fact to find unlawful discrimination, without additional, *independent evidence of discrimination.*" Id. As a result of this ruling, a Plaintiff need only show that, from the record, a reasonable juror could find that the Defendant's articulated reason for termination is pretextual, in order to have met the Plaintiff's burden under the shifting burden test.

## V. Retention of an employee by a supervisor, or indirect superior is not conclusory evidence dispelling any proof of discriminatory motive, especially in this case.

In the Supplemental Report and Recommendation, and, by reference, in the Order appealed in this case, the Judges seem to be creating a new inference to be drawn against the non-moving party (the undersigned can find no authority to support such an inference). The Court asserts that the fact that Teppara, one of the two decision makers, had been the Plant manager (not a direct supervisor) for some time, and had not terminated Shumpert before the actual decision to terminate, proves that Teppara bore Shumpert no animus because of his age. Here, again, the Judges are drawing inferences which are not only not supported by law or the record, but are in favor of the moving party, which is the opposite of what they are supposed to be doing at the Summary Judgment Stage of the case. Furthermore, Teppara had never been in the position of considering the Shumpert for termination, as Shumpert's supervisor had never before recommended his termination for review by the plant manager. Had Teppara actually had the opportunity to terminate Shumpert, and chose not to do so, the Judge's finding drawing an inference against the non-moving party at Summary Judgment,

although still outside the scope of review at Summary Judgment might have some merit. However, that is not the case. This was the first time Teppara had *ever* been asked to affirm the termination of Shumpert. The actual person who initialed the termination decision, Schnipke, was Shumpert's direct supervisor. It is undisputed that Schnipke had made about 24 comments about Shumpert's advanced age, constantly and consistently, during the brief period of three months between the time Schnipke had become his supervisor and the date of the decision to terminate the Shumpert. It is also undisputed that Schnipke made the decision to terminate, and that Teppara simply agreed to it. There is significant evidence that, but for Mr. Shumpert's age, he would not have been terminated. Teppara's having been plant manager for a time before actually being presented with the decision to terminate Shumpert does not conclusively negate the proof of disparate treatment that has been offered, and acknowledged, in two separate Report and Recommendations, and the Order, here appealed (by direct incorporation), as sufficient to prove a prima facie case of age discrimination.

## CONCLUSION

The record in this case does contain genuine issues of material fact, making the case inappropriate for dismissal at Summary Judgment. In concluding otherwise, the Court below drew

inferences against the non-moving party in a Summary Judgment analysis, applied a pretext-plus standard, which is no longer applicable to civil rights cases, and failed to recognize that the establishment of a prima facie case of discrimination is evidence that a reasonable inference of discriminatory motive can be attributed to the Defendant. The Appellant respectfully requests that the Appellate Court reverse the U.S. District Court's Order in this case, and remanded the case for trial.

For the reasons set forth above, Petitioner PAUL SHUMPERT respectfully prays that the Court grant a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Respectfully Submitted,

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No.

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IN THE SUPREME COURT OF THE UNITED STATES

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PAUL SHUMPERT,

*Petitioner,*

v.

MANCOR, CAROLINA, INC.,

*Respondent.*

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

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APPENDIX
Rule 14(b)

**Rule 14 (b)(i) Opinions, Orders, Findings of fact and conclusions of law entered in conjunction with the judgment sought to be reviewed**

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# REPORT AND RECOMMENDATION OF MARCH 10, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

PAUL E. SHUMPERT, )
)
Plaintiff, ) C/ANo. 3:00-2480-22BD
)
) **REPORT AND**
) **RECOMMENDATION**
V. )
)
MANCOR )
CAROLINA, INC., )
)
Defendant. )

This action has been filed by the Plaintiff against the Defendant pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, asserting a claim of age discrimination.

The Defendant filed a motion for summary judgment pursuant to Rule 56, Fed.R.Civ.P., on October 1, 2003. Plaintiff filed a memorandum in opposition to the Defendant's motion on October 14, 2003, and the Defendant filed a reply memorandum on October 21, 2003. Defendant's motion is now before the Court for disposition.[1]

Background and Evidence[2]

Plaintiff is a former employee of the Defendant, where he was hired in November

[1]This case was automatically referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(g), D.S.C. The Defendant has filed a motion for summary judgment. As this [illegible] is a dispositive motion, this Report and Recommendation is entered for review by the Court

[2]The facts and evidence are considered and discussed hereinabove in the light most favorable to the Plaintiff, the party opposing summary judgment. Pittman v. Nelms, 87 F.3d 116, 118(4thCir. 1996).

1995 as a quality inspector in a temporary position. Plaintiffs Deposition, pp. 17-18. At the time of his hire, Plaintiff was sixty-three years old. Plaintiffs Deposition, p. 17. In 1996, Plaintiff was laid off as part of a reduction in force (RTF), but was later recalled to work for the Defendant in 1997 in a permanent position of quality inspector. Plaintiffs Deposition, pp. 18-19.

On August 3, 2001, Plaintiff and another employee, Rodney Lloyd, were involved in an altercation. Duane Schnipke, the Plaintiffs supervisor, exited his office which was approximately 25 feet from the altercation and observed Plaintiff striking Lloyd in the chest. Schnipke Deposition, p. 21; Plaintiffs Deposition, p. 33, Schnipke did not witness anything that happened prior to Plaintiff striking Lloyd. Schnipke Deposition, p. 21; Plaintiffs Deposition, p. 33. Plaintiff continued to shout and yell profanity after Schnipke told him to calm

town and inquired. Schnipke Deposition, p. 68; Teppara Deposition, pp 9-10, see also Plaintiff's Deposition, p 33. The Plant Manager, Dilip Teppara, also heard the ruckus and observed basically the same thing that Schnipke observed. Teppara Deposition, pp 11, 21.

Immediately following this incident, Schnipke recommended that Plaintiff be terminated. Schnipke Deposition, pp 24, 71. Teppara decided to terminate the Plaintiff, and Schnipke typed up a letter and a statement concerning the termination, which Teppara then signed. Teppara Deposition, p 13, Exhibit 2. Schnipke then met with the Plaintiff and told him that he was being terminated. The Defendant did not impose any disciplinary measures against Lloyd. Lloyd Deposition, pp. 43-44, 47.

Plaintiff then filed a charge of discrimination with the South Carolina Human Affairs Commission (SCHAC)[3], alleging that he had been discriminated against on the basis of his age. After receiving a right to sue letter, Plaintiff filed this action in United States District Court, to which Defendant has now filed its motion for summary judgment. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show thai there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed.R.Civ.P. The moving party has the burden of proving that judgment on the pleadings is appropriate. Once the moving party makes this showing, however, the opposing party must respond to the motion with "specific facts showing there is a genuine issue for trial." Rule 56(e), Fed.R.Civ.P.

**Discussion**

Plaintiff's ADEA claim is for disparate treatment, based on his allegation that he was discriminated against on the basis of his age when he was terminated by the Defendant. Disparate treatment cases under ADEA require proof of intentional discrimination, either by direct evidence or by the structured procedures set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); see also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Plaintiff concedes that he does not have any direct evidence of age discrimination in his termination.[4] See

[3]As South Carolina is a deferral state, Plaintiff could file his administrative claim with SCHAC, instead of with the Equal Employment Opportunity Commission (EEOC). Nelson v. Lockheed Missiles and Space Co., No. 97-1430, 1997 WL 727609 at **] n. I (4th Cir. November 24, 1997); E.E.O.C. v. Hansa Products, Inc., 844 F.2d 191, 192 n. 1 (4th Cir, 1988) (quoting 42 U.S.C. § 2000e-5(e)) ["A deferral state is one 'which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice.'"]; see S.C.Codc Ann. § 1-13-90, *sL* seq., as amended.

"Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact without any inferences or presumptions. O'Connor v. Consolidated Coin CaterersCorp., 5

Plaintiffs Memorandum in Opposition to Summary Judgment, p. 9. However, the absence of direct evidence of discrimination is not fatal to Plaintiffs

claim. As direct proof of discrimination rarely exists in this type of case. In such a situation, indirect evidence of discrimination may be presented through the McDonnell Douglas framework. Plaintiff also argues that he should prevail under the "mixed-motive" method of proving age discrimination, which the undersigned has discussed separately.

**1. (McDonnell Douglas Analysis)**

The United States Supreme Court articulated a three-part analysis for evaluating discrimination cases in McDonnell Douglas. First, Plaintiff must establish a prima facie case of discrimination. Once a prima facie case has been established, a rebuttable presumption is created that the employer unlawfully discriminated against the Plaintiff. Second, once this presumption has been established, the burden of production shifts to the employer to show a legitimate, non-discriminatory reason for its actions. Third, if the employer shows a legitimate, non-discriminatory reason for its actions, the burden is then on the Plaintiff to come forward with evidence that the employer's asserted reasons for its actions are a mere pretext for its true discriminatory motives, and that the actions of the employer were really based on Plaintiffs age. McDonnell Douglas Corp., 411 U.S. at 802-805; Texas Dep't of Community Affairs, 450 US, at 252-256; Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 234-235 (4th Cir. 1991). Despite these shifting

F.3d 542, 548-549 (4th Cir. 1995), rev'd on other grounds, 517 U.S. 30S (1996); Black's Law Dictionary, 460 (6th Ed. 1990) (citing State v. McClure 504 S.W.2d 664, 668 (Mo.Ct.App. 1974). see Williams v. General Motors Corp.

656 F. 2d 120, 130(5thCir. 1981) cert. denied, 455 U.S. 943 (1982)

burdens of production, however. Plaintiff retains the ultimate burden of persuasion on the issue of discrimination throughout. Texas Dep't of Community Affairs, 450 U.S. at 252-253; see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993)

1) Prima facie case. As noted in order to satisfy the first prong of the McDonnell Douglas three-part analysis, Plaintiff must establish a prima facie case of discrimination. For purposes of this case, in order to set forth his prima facie case of disparate treatment, Plaintiff must establish the following: (1) that he was an employee covered under the ADEA; (2) that he was discharged by an employer covered by the ADEA; (3) that he was performing his job duties at a level that met his employer's legitimate expectations at the time of his discharge; and (4) that his discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination. Halperin v. Abacus Tech. Corp., 128 F.3d 191, 200 n. 13 (4th Cir. 1997), abrogated on other grounds by, Baird v. Rose, 192 F.3d 462 (4th Cir. 1999); Lovelace v. Sherwin-Williams Co., 681 F.754 F.2d 1100, 1105-1106 (4th Cir. 1985). See also Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3d 657 (4th Cir. 2004).[5] Defendant does not contest that Plaintiff is a member of a protected class under the ADEA (over 40), and that he was discharged. However, Defendant argues that Plaintiff cannot establish a prima facie case because he cannot establish that his job performance was satisfactory, or that his discharge occurred under circumstances giving rise to a reasonable inference of unlawful discrimination. The undersigned

does not agree.

"The exact standard to be used in establishing a prima facie case is flexible depending on the factual situation and the claim alleged. Ennis v National Ass'n of Business and Educational Radio Inc 53F 3d55,58(4thCir 1995)

First, with respect to Plaintiff's job performance, the Defendant's argument that Plaintiff was not satisfactorily performing his job relates to the conduct for which the Defendant contends Plaintiff was terminated; i.e., striking another employee. However, that is not the basis on which this Court generally determines whether an employee was satisfactorily performing their job for purposes of a discrimination claim. Rather, in determining whether a Plaintiff was satisfactorily performing their job, the Court looks to how the Plaintiff had generally been performing his job *prior to* the incident at issue in the lawsuit. Brown v. Chicago Transit Authority. No. 97-7041, 1999 WL 495622 at *5 (N.D.Ill. June 28, 1999) [Plaintiffs general job performance, not the specific incident(s) which may have precipitated his termination, is the proper question to consider in determining whether Plaintiff can establish the satisfactory performance element of his prima facie case); Crosby v. Federal Signal Corp.; No. 97-4967, 1998 Wl, 603125 at *5 (N.D.Ill. Sept. 4, 1998). There is no evidence in the record to show that Plaintiff was not satisfactorily performing his job prior to the incident involving Lloyd on August 3, 1999. In fact, the Defendant "frankly admit[s] that Plaintiffs quality of work was good." Defendant's Memorandum in Support of its Motion fur Summary Judgment, p. 4; Teppara Deposition, p. 7. Therefore, the Defendant's argument that Plaintiff has failed to establish his prima facie case on this ground is without merit.

With respect to the Defendant's second argument. Plaintiff contends that he was treated differently from a similarly situated non-protected employee (Lloyd)[6] because he was

[6]While it is not clear what age Lloyd was at the time of the incident at issue. Defendant has not contested Plaintiffs assertion that Lloyd was an individual outside of Plaintiffs protected class for purposes of an ADEA claim. Therefore, for purposes of summary judgment, the undersigned has assumed this fact as having been established.

terminated, while Lloyd was not only not terminated, but was not even disciplined for this incident.[7] While Defendant argues that, although Lloyd and Plaintiff were both involved in the altercation, they were not engaged in similar conduct, Plaintiff testified that Lloyd had a past history of violence and argues that he should have at least been disciplined in the same manner as the Plaintiff. Lloyd's Deposition, pp. 25, 31 -32, Exhibit One; Plaintiffs Deposition, p. 5L Plaintiff also contends that he had himself reported Lloyd's inappropriate conduct to Schnipke in the past; Plaintiffs Deposition, pp. 26-28; Lloyd Deposition, pp. 50-52; Schnipke Deposition, pp. 411-43; as well as that Lloyd was the aggressor in the altercation and that Plaintiff was merely defending himself. Plaintiffs Deposition, pp, 29-33,

Considered in the light most favorable to the Plaintiff, a reasonable fact finder could construe these facts as evidence that a similarly situated employee from outside of Plaintiff's protected class received more favorable treatment. *Cf.* Holifield v. Reno, 115 F.3d

1552, 1562 (11th Cir. 1997) ["In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways."]; Frazier v. Dep't of Labor, No. 01-198, 2003 WL 21254424, at *2 (S.D.Ind. March 4, 2003) ["In deciding whether another employee is similarly situated to the plaintiff, the court must consider 'all relevant factors, the number of which depends on the context of the case.'"] (quoting Patterson v. Avery Dennison

[7]Plaintiff further argues in his brief that Schnipke made comments to the Plaintiff about his age and plans for retirement, which Plaintiff contends shows that age played a role in his termination. Plaintiff cites to an "affidavit" from the Plaintiff as support for this contention. However, no affidavit from the Plaintiff has been filed or submitted to the Court, and on further inquiry to counsel from the Court, no affidavit has been forthcoming. Furthermore, Plaintiff has not provided any citations to evidence in the record showing any age based comments.

Therefore, the undersigned finds for purposes of summary judgment that Plaintiff has established all of the necessary elements for his prima facie case, and the Court must turn to consideration of the next prong of the McDonnell Douglas analysis. See Texas Dep't of Community Affairs, 450 U.S. at 253 [The burden of establishing a prima facie case is not onerous.]; see also Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991) [when considering whether a Plaintiff has presented a prima facie case under the McDonnell Douglas

proof scheme, the Court should
"...resist the temptation to become so convinced in the intricacies of the proof scheme [set out in McDonnell Douglas] that [it] forget[s] that the scheme exists solely to facilitate determination of 'the ultimate question of discrimination vel non'."].

2) **Legitimate, non-discriminatory reason**

When a Plaintiff establishes a prima facie case, it falls to the Defendant to then set forth a legitimate, nondiscriminatory reason for its actions. Lovelace v. Sherwin Williams Co., 681 F.2d 230, 239 (4th Cir. 1982).[8] Here, the Defendant has presented evidence to show that Plaintiff was terminated for inappropriate behavior, including striking another employee. Schnipke Deposition, pp. 15, 18; Teppara Deposition, pp. 9-10; Exhibit 2; Exhibit 3). This evidence is sufficient for the Defendant to meet its burden of production to show a legitimate, non-discriminatory reason for its decision to terminate the Plaintiff, and the Court must therefore turn to consideration of the final prong of the McDonnell Douglas analysis. EEOC v. Clay Printing Co., 955 F.2d 936, 941 (4th Cir. 1991) [ADEA case] [The defendant's burden is only one of production, not of persuasion].

[8]The establishment of a prima facie case shifts to the Defendant the burden of producing evidence on this issue. Lovelace v. Sherwin-Williams Co., supra.

3) **Pretext**. Where a Defendant rebuts the employee's inference of discrimination , by demonstrating

a legitimate, non-discriminatory reason for the employment decision, in order to prevail the Plaintiff employee must demonstrate by a preponderance of the evidence that the employer's proffered reason is a mere pretext for discriminatory conduct. To make this demonstration, Plaintiff must show that "but for" his employer's intent to discriminate against him because of his age, he would not have suffered the adverse employment action. EEOC, 955 F.2d at 941; Conkwright, 933 F.2d at 234. "Direct or indirect evidence of discriminatory motive may do, but 'the evidence as a whole . . . must be sufficient for a reasonable fact-finder to infer that the employer's decision was motivated by [age animus],'" LeBlanc v. Great American Insurance Co., 6F.3d836, 843 (1st Cir. 1993(citing Goldman v. First Nat'l Bank, 985 F.2d 1113, 1117 (1stCir. 1993)(quoting Connell v. Bank of Boston, 924 F.2d 1169, 1172, n. 3 (1st Cir. 19911, cert. denied, 111 S.Ct. 2828 (1991)); see Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 141-143 (2000).

After careful review of the evidence and arguments submitted to the Court, the undersigned does not find that Plaintiff has presented a sufficient issue of material fact as to whether he was the victim of age discrimination to avoid summary judgment. The mere fact that an employer chooses to terminate an older employee, and does not terminate a younger employee, does not in and of itself amount to evidence of age discrimination, *Cf.* Nix v. WLCY Radio/Rahail Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) ["The differential treatment of a plaintiff and someone outside the protected class] is not enough, by itself, to support judgment for : [plaintiff"]. Rather, as has previously been stated, in order to survive summary judgment Plaintiff must present evidence "sufficient for a reasonable fact-finder to infer that the

employer's decision was motivated" by his age. Plaintiff has presented no such evidence. The evidence shows that when Plaintiff was hired by the Defendant in a permanent position he was already 64 years old, and that his supervisors thereafter considered him to be a good worker. Plaintiff fails to explain why individuals who were willing to hire and retain someone of a relatively advanced age such as himself would suddenly decide to terminate him because he was too old. Plaintiff also testified that he did not have any problems with either Teppara or Schnipke prior to the incident which resulted in his termination. Plaintiff's Deposition, pp. 20, 22; and Plaintiff has cited no evidence in the record of any age-based comments on the part of the decisionmakers or any other evidence of discriminatory animus based on Plaintiffs age.

While Plaintiff may or may not have a legitimate argument as to whether the incident was properly investigated, and whether the discipline meted out was fair to both parties, the only issue before this Court is whether there is any evidence that the Defendant's decision was based on Plaintiffs age. In order to maintain his disparate treatment claim, Plaintiff must present credible evidence that the decision to fire him was because of his age, not because the Defendant was simply incorrect or unfair in its disciplinary actions, or because of other factors. Jamil v. Secretary Dep't of Defense, 910 F.2d 1203, 1207-1208 (4th Cir, 1990); Holder v. Raleigh, 867 F.2d 823, 828 (4th Cir. 1989); Crowley v. Prince George's County, 890 F.2d 683, 687 (4th Cir. 1989), cert. denied, 111 S.Ct. 101 (1992); McCollum v. Bolger, 794 F.2d 602, 610 (11th Cir. 1986), cert denied, 479 U.S. 1034 (1987); see generally Moore v. Sears, Roebuck & Co., 683 F.2d 1321, 1323, n. 4 (11th Cir. 1982); Jones v. Orleans Parish School Board, 679 F.2d 32, 38 (5th Cir. 1982), modified on other grounds, 688 F.2d

342 (5th Cir. 1982), cert. denied 461 U.S. 95) (1983); North Carolina Dep't of Corrections v. Gibson, 301 S.E.2d 78, 85 (N.C. 1983). St. Mary's Honor Ctr. v. Hicks, supra. Plaintiff bears the burden of producing such evidence. Texas Dep't of Community Affairs v. Burdine, supra; St. Mary's Honor Ctr. v. Hicks, supra. He has failed to do so. Plaintiff has not presented any evidence to show that any failure by the Defendant to investigate this incident further was based on any type of age discrimination, nor is there any evidence that age entered into the decision to fire him.

At summary judgment, the non-moving party has an obligation to present evidence to save his or her allegations from the status of speculation, and must respond with specific facts showing a genuine issue for trial. Rule 56, Fed.R.Civ.P.; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Gairola v. Virginia Dep't of General Services, 753 F.2d 1281, 1288, n. 4 (4th Cir. 1985). Although Plaintiff may sincerely believe that he was discharged because of his age, an ADEA plaintiff cannot defeat a properly supported motion for summary judgment with unsupported speculation or allegations of discrimination. Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir, 1985) overruled on other grounds, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987); Beale v. Hardy, 769 F.2d 213,214 (4th Cir. 1985) [A party opposing summary judgment "cannot create a general issue of fact through mere speculation or by the building of one inference upon another."].

Therefore, since Plaintiff has failed to present any evidence of pretext, his ADEA discrimination claim should be dismissed.

II. (Mixed-Motive Analysis)

The Fourth Circuit has recently addressed the mixed-motive framework in an ADEA case, as follows: Under the mixed-motive framework established by the Supreme Court in Price-Waterhouse v. Hopkins, appellants must prove through direct evidence that age was a substantial motivating factor in the termination decision. See 490 U.S. 228, 258, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion); id. at 259 (White, J., concurring); id. at 276 O'Connor, J., concurring). If appellants satisfy this burden then [Plaintiff] must prove that [Defendant] would have taken the same action even absent consideration of age in order to avoid liability. Price Waterhouse, 490 U.S. at 258 (plurality opinion); id. at 259-60 (White, J. concurring); id. at 276-77 (O'Connor, J., concurring).

The Price Waterhouse framework of proving discrimination, created in the Title VII context and adopted in the ADEA context, has been altered by Congress for Title VII claims. In the Civil Rights Act of 1991, Congress made the mixed-motive framework more favorable 10 Title VII plaintiffs in two ways. See Hill v. Lockheed Martin Logistics Mgmt., Inc., — F.3d —, No. 01-1359, 2004 WL 25018, al —-3-5 (4th Cir. Jan. 5, 2004) (en bane). First, Congress provided that plaintiffs can invoke the codified mixed-motive framework by putting forth any type of evidence— direct or circumstantial— which demonstrates that discriminatory animus was a motivating factor for an employment practice. See 42 U.S.C. § 2000e-2(m) (2003); Desert Palace, Inc. v. Costa, 539 U.S. 90, 123 S.Ct. 2148, 2153-55, 156 L.Ed.2d 84(2003). Second, Congress disallowed employers from escaping liability by proving hat they would have made the same decision even

without any discrimination. Rather, such proof only permits employers to limit the remedies available to plaintiffs. See 42 U.S.C. § 2000e-5(g)(2)(B).

We have not had occasion to decide whether the mixed-motive provision under the Civil Rights Act of 1991 applies to the ADEA. We have previously expressed doubt that it does, and instead we have suggested that the Price Waterhouse framework still applies to ADEA claims. See e.g. Hill, 354 F.3d 277, 2004 WL 25018, at *4 n. 2. This is in large part because, when Congress enacted the Civil Rights Act of 1991 in response to Price Waterhouse, it amended only Title VII and did not pass a corresponding amendment to the ADEA. And maintaining the higher evidentiary burden in Price Waterhouse for ADEA claims is not implausible, given that age is often correlated with perfectly legitimate, non-discriminatory employment decisions. Mereish v. Walker, ___ F.3d _, 2004 WL 318471 at *8 (4th Cir. Feb. 20, 2004).

Based on Mereish, it is unclear whether the mixed-motive provision under the Civil Rights Act of 1991 applies to ADHA claims. Nevertheless, whether this provision is applicable to this case or not does not change the outcome based on the facts and evidence presented, because whether the analysis is under the mixed-motive framework or the more lenient standard found in 42 U.S.C.§ 2000-2(m), there is no evidence in the record in this case, direct or circumstantial, upon which a jury could reasonably conclude that age was a motivating factor in Defendant's decision to terminate the Plaintiff. See, discussion, supra. Mereish, 2004 WL

318471 at *8; Love-Lane v. Martin, 355 F.3d 766, 786-787 (4th Cir. 2004), &£ Dare v. Wal-Mart Stores, Inc., 267 F.Supp.2d 987 (D.Minn. June 13, 2003). Therefore, Plaintiffs claim is subject to dismissal even if considered under the mix-motive analysis.

## Conclusion

Based on the foregoing, it is recommended that the Defendant's motion for summary judgment be **granted**, and that this case be **dismissed**.

Bristow Marchant
United States Magistrate Judge

Columbia, South Carolina

March 9, 2004

# ORDER RECOMMITTING MATTER TO MAGISTRATE JUDGE JULY 6, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

| | | |
|---|---|---|
| PAUL L. SHUMPERT,<br><br>Plaintiff,<br><br>V.<br><br>MANCOR CAROLINA, INC.,<br><br>Defendant. | )<br>)<br>) C/ANo.3:00-2480-22BD<br>)**ORDER**<br>)**RECOMMITTING**<br>)**MATTER TO**<br>) **MAGISTRATE JUDGE**<br>)<br>)<br>)<br>) | |

## INTRODUCTION

This matter is before the court on cross objections to the Report and Recommendation ("Report") of the Magistrate Judge to whom the matter was assigned pursuant to 28 U.S.C. § 636 and Local Civil Rule 73.02, D.S.C. The Report recommends that the motion for summary judgment filed by Defendant Mancor Carolina, Inc., ("Mancor") be granted and that judgment be entered against

Plaintiff Paul L. Shumpert ("Shumpert").

For the reasons set forth below, the court concludes that there are further matters which should be addressed by the Magistrate Judge prior to this court deciding the pending motion for summary judgment and a related motion to strike. The court, therefore, recommits the matter to the Magistrate Judge for further proceedings to address the issues discussed below.

## STANDARD

The Magistrate Judge makes only a recommendation to this court. That recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. See Mathews v. Weber, 423 U.S. 261 (1976). The court is charged with making a de novo determination of those portions of the recommendation to which specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter to him with instructions. See 28 U.S.C. § 636(b)(l). Because the underlying motion is a motion for summary judgment, this court applies the summary judgment standard in making its review of the portions of the Report to which objection is made. Fed. R. Civ. P. 56.

## DISCUSSION

Through this action, Shumpert challenges his termination from employment with Mancor. Specifically, Shumpert asserts that he was terminated because of his age.[1] It is, however, undisputed that

Shumpert was terminated immediately after being observed by supervisory employees striking Rodney Lloyd, a younger employee. Shumpert's claim of age discrimination rests primarily on the fact that he was terminated while Lloyd was not disciplined at all for this incident and, allegedly, received less discipline for similar behavior on other occasions. As Shumpert identifies no other similarly situated individual, the critical question is whether Lloyd's actions in this or earlier incidents were sufficiently similar to Shumpert's actions to raise an inference that any differences in discipline were motivated by something other than differences in the behavior being corrected. The supervisors who witnessed the altercation which led to Shumpert's termination testified that they saw Shumpert strike Lloyd but did not observe aggressive behavior by Lloyd directed toward Plaintiff. Depos. of Dillip Tepparat at 9-10; Depos. of Duane R. Schnipke at 18,49,& 68. They also testified that Shumpert continued to be "very irate," to yell and curse, and even to lunge at Lloyd after the supervisors intervened and directed both to calm down. Id. Lloyd, on the other hand, followed the instructions to calm down and to leave the area. While Plaintiff testified that Lloyd initiated the altercation, he conceded that his supervisors may not have seen what happened before he hit Lloyd. He also conceded that he remained highly agitated for some time after the

1 Plaintiff was in his late sixties at the time of termination. He was hired by Mancor twice since reaching the age of sixty.

supervisors intervened. Thus, there appears to be undisputed evidence that Shumpert and Lloyd acted differently on the date in question. There was also other evidence of physically aggressive behavior by Shumpert directed toward Lloyd which the supervisors might have considered in deciding that Shumpert posed a greater threat to the safety of the workplace than did Lloyd.2

The evidence of Lloyd's earlier behavior does, as Plaintiff suggests, indicate that he was involved in several incidents involving aggression or violence. While he was disciplined for these incidents, he was not terminated.

The Magistrate Judge relied on the differences between the discipline issued to Shumpert and to Lloyd in concluding that Plaintiff could satisfy the fourth element of his prima facie case under the burden shifting analysis first applied in McDonnell Douglas Corp. v. Green, 411U. S. 792 (1973). The Magistrate Judge also concluded that the fight itself should be excluded from consideration in determining the adequacy of Plaintiff's job performance for the second prong of the analysis. Defendant objects to both determinations, although it concurs with the Magistrate Judge's ultimate recommendation. Plaintiff, by contrast, objects to the Magistrate Judge's ultimate recommendation that summary judgment be entered against Plaintiff based on Defendant's proffered legitimate reason for termination (the fight) and because Plaintiff had not proffered adequate evidence to create a jury issue as to pretext.3

2 Plaintiffs immediate supervisor testified to an incident in which Shumpert picked up a crescent wrench in the

supervisor's office while engaged in an argument with Lloyd. The supervisor believed that Plaintiff intended to harm Lloyd with the wrench. Only a verbal warning was given on that date. Schnipke depos. at 72.
3 Plaintiff argues that the Magistrate Judge's determination as to the issue of pretext is logically inconsistent with his determinations that Plaintiff satisfied the third and fourth prongs of his prima facie case. In making this argument, Plaintiff ignores the fact that the Magistrate Judge excluded consideration of the fight at the third prong of the prima facie case.....

While this court is not prepared to decide that the Magistrate Judge's ultimate conclusion as to the prima facie case was in error, it does believe further development of the related issues is required. Specifically, the Magistrate Judge should compare the nature of the events for which Lloyd was previously disciplined to the incident for which Shumpert was terminated, hi addition, the Magistrate Judge should compare Lloyd's actions to Shumpert's actions in the specific incident which precipitated Shumpert's termination. In both respects, the Magistrate Judge should consider the incidents from the standpoint of what the relevant supervisors knew or saw as this is the only perspective from which it can be determined whether Lloyd and Shumpert were treated differently in similar situations.4 The Magistrate Judge should also consider whether the same supervisors were involved in both sets of decisions. These determinations should then be applied to the prima facie case and in deciding whether Plaintiff has produced evidence which might present a jury issue as to pretext.5
As to the issue of pretext, the Magistrate Judge should

also address the impact, if any, of Plaintiffs October 16, 2001 affidavit which asserts that the supervisor who terminated Plaintiff had

4 For example, actually observing one employee strike another in the workplace may justify (indeed require) a more severe sanction man disputed allegations of similar incidents or proven allegations of less serious incidents.
5 It cannot be disputed that fighting is a legitimate basis for termination. At least one appellate court has also determined that it also causes an employee not to be a "qualified" employee. See Palmer v. Circuit Court of Cook County, Hi 117 F.3d 351,352-53 (7th Cir.1997) (referring to the Americans with Disabilities Act in stating that "The Act does not require an employer to retain a potentially violent employee. Such a requirement would place the employer on a razor's edge—in jeopardy of violating the Act if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone. The Act protects only "qualified" employees, that is, employees qualified to do the job for which they were hired; and threatening other employees disqualifies one. EEOCv. Amego, Inc., 110 F.3d 135 (1st Cir. 1997); Johnson v. New York Hospital, 96 F.3d 33 (2d Cir. 1996) (per curiam); Williams v. Widnall, 79 F.3d 1003, 1006 (10th Cir. 1996); Crawford v. Runyon, 79 F.3d 743 (8th Cir. 1996); Pesterfield v. IYA, 941 F.2d 437, 442 (6th Cir.1991);cf. Ward v. Procter & Gamble Paper Products Co., 111 F.3d 558,560 (8thCir.1997)").

been asking him twice weekly for three months when he planned to retire.6 The Magistrate Judge overlooked the affidavit based on a combination of factors including Plaintiffs failure to identify the affidavit (which was filed two years before the

relevant summary judgment motion) and Plaintiffs failure to respond adequately to an inquiry from the court 7 Plaintiffs first clear identification of the affidavit came in connection with his objection to the Report in which he concedes that he "located the clocked affidavit only recently " Plaintiffs Objection Memorandum at 3 (filed March 16, 2004). Plaintiff also, apparently, failed to properly serve Defendant with this affidavit. Defendant has moved to strike the October 16, 2001 affidavit for these reasons.

In directing the Magistrate Judge to address the impact of the affidavit, this court does not preclude the Magistrate Judge from determining that the affidavit should not be considered based on Plaintiff s failure to specifically identify or properly serve the affidavit or to properly respond to

6 This court agrees with Defendant that inquiries relating to retirement plans are not necessarily evidence of age bias. Here, however, Plaintiff avers that he was asked twice weekly for three months when he planned to retire and that this aggressive pattern of questioning commenced with the retirement of Plaintiffs former supervisor. This is more than a simple inquiry into retirement plans.

7 The assumed absence of the affidavit from the record is addressed in a footnote in which the Magistrate Judge states:

Plaintiff [argues] that [his immediate supervisor] made comments to the Plaintiff about his age and plans for retirement, which Plaintiff contends shows that age played a role in his termination. Plaintiff cites to an "affidavit".. .as support for this contention. However, no affidavit from the Plaintiff has been filed or

submitted to the Court, and on further inquiry to counsel from the Court, no affidavit has been forthcoming. Furthermore, Plaintiff has not provided any citations to evidence in the record showing any age related comments. Report at 7 (emphasis added). The Magistrate Judge obviously considered the absence of this evidence in rejecting Plaintiff's pretext argument. Report at 10 (stating that Shumpert had "cited no evidence in the record of any age-based comments on the part of the decisionmakers or any other evidence of discriminatory animus based on Plaintiff's age.")

inquiries from the court.8 What action should be taken in this regard depends on the nature of the court's inquiry and Plaintiffs response, if any. These are matters as to which this court has no information. This court will not, therefore, rule on the motion to strike to the extent it relates to the October 16, 2001 affidavit but leaves that for consideration by the Magistrate Judge. Further, in light of Plaintiff s apparent failure to serve this affidavit on defense counsel, the Magistrate Judge should consider whether to allow Defendant to reconvene Plaintiff s deposition to address the issues raised by the affidavit should the Magistrate Judge determine that the affidavit should be considered.9

A last matter which the Magistrate Judge should address relates to the statement in the Report that "Plaintiff fails to explain why individuals who were willing to hire and retain someone of a relatively advance age such as himself would suddenly decide to terminate him because he was too old." Report at 10. hi his objection, Plaintiff argues that this statement is

incorrect because the particular individuals who hired him had left the company by the time Plaintiff was terminated. In support of this argument, Plaintiff presents a supplemental affidavit Defendant has moved to strike this affidavit as well. Plaintiff argues that the supplemental affidavit is not improper first because it addresses an issue not directly raised by Defendant's motion. Thus Plaintiff did not have notice

8 The affidavit is identified in Shumpert's memorandum in opposition to summary judgment only as "Shumpert Affidavit." While other supporting documents are attached to the memorandum, the affidavit is not.

9 Defendant argues that the affidavit should not be considered because it was not served on Defendant and because it contradicts Plaintiffs deposition testimony. Defendant's Response to Plaintiffs Objections at n. 1 (filed March 29,2004). Defendant does not, however, cite any clearly contradictory testimony. The only cited testimony which the court has found which is arguably contradictory was Plaintiffs response to a query as to whether he had previously been treated unfairly by Mancor to which Plaintiff responded: "Nothing that I ever made any complaints about." Shumpert depos. at 47 (cited in Defendant's September 26,2003 memorandum at 6-7). While there may be other contradictory testimony on which Defendant may rely, the above quoted testimony is not sufficiently on point to, alone, bar consideration of the affidavit.

that this issue was in contest.10 Plaintiff farther argues that the affidavit merely consolidates information which could be found elsewhere in the record.11 In light of the decision to recommit this matter to the Magistrate Judge and the relationship between the

motion for summary judgment and the motion to strike, this court will also defer on this aspect of the motion to strike.

## CONCLUSION

For the reasons set forth above, the court recommits the matter to the Magistrate Judge with instructions to address Defendant's motion to strike and to again consider Defendant's motion for summary judgment in light of the concerns set forth above. In giving this instruction, the court does not limit the issues which the Magistrate Judge may consider. Neither does the court preclude the limited reopening of discovery to the extent necessary to avoid unfair advantage created by the late filing of affidavits.

IT IS SO ORDERED

CAMERON MCGOWAN CURRIE UNITED STATES
DISTRICT JUDGE
Columbia, South Carolina
July, 6 2004

10 The foundation of this argument appears to be correct. While Defendant's arguments in support of summary judgment may suggest that Mancor both hired and fired Plaintiff when he was in his mid-sixties, Defendant does not suggest that the same individuals were involved in the hiring and firing decisions.

11 If this is true, the affidavit is unnecessary and Plaintiff should cite to the relevant portions of the record.

# ORDER OF SEPTEMBER 22, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

PAUL L. SHUMPERT,)
)
Plaintiff, ) C/ANo.3:00-2480-22BD
) **ORDER**
V. )
)
MANCOR CAROLINA,)
INC., )
)
Defendant. )

This action has been filed by the Plaintiff against the Defendant pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C, § 621, asserting a claim of age discrimination. In a Report and Recommendation filed March 10, 2004, the undersigned recommended that the motion for summary judgment filed by the Defendant in this action be granted, and that this case be dismissed.

Subsequently, in an order issued by the Honorable Cameron McGowan Currie, United States District Judge, on July 6, 2004, the matter was recommitted to the undersigned with instructions, As part of that order, Judge Currie referenced two affidavits filed by the Plaintiff, and noted that a decision would need to be made as to whether the Court should consider these affidavits, or whether the Defendant's pending motion to strike these affidavits

should be granted.

With respect to the first affidavit referenced in Judge Currie's order (dated and filed October 16, 2001), this affidavit was not specifically referenced or cited to by the Plaintiff in responding to the Defendant's motion for summary judgment. In fact, the undersigned made a specific inquiry with Plaintiffs counsel concerning his reference to an "affidavit" in his response to the Defendant's motion for summary judgment, to which Plaintiff's counsel failed to even respond. It was not until Plaintiffs counsel filed objections to the undersigned's Report and Recommendation that he referred the Court to this previously filed affidavit. For his part, defense counsel contends that he had never received a copy of this affidavit. The second affidavit referenced by Judge Currie in her order (submitted with Plaintiffs objections to the Report and Recommendation) responds to an issue raised in the Report and Recommendation, Although the undersigned has little sympathy for Plaintiffs position with respect to the first affidavit since Plaintiffs counsel specifically failed to respond to a direct inquiry from the Court concerning this affidavit and whether it was part of the record, the undersigned will nevertheless consider both of these affidavits in issuing a supplemental Report and Recommendation in this case. Therefore, Defendant's motion to strike these affidavits is denied. However, as defense counsel was not aware of the existence of the first affidavit, and only received the second affidavit as part of Plaintiff s objections to the previously issued Report and Recommendation, the Court will reopen the discovery period for the sole purpose of allowing a supplemental deposition of the

Plaintiff on the issues raised in these affidavits. This deposition should be completed within thirty (30) days of the date of this order. Thereafter, Defendant may supplement its memorandum in support of summary judgment within fifteen (15) days of its receipt of the transcript from Plaintiffs reopened deposition. Plaintiff shall file any response memorandum within fifteen (15) days following Plaintiffs counsel's receipt of Defendant's supplemental brief, The Court will then issue a supplemental Report and Recommendation in this case.

**IT IS SO ORDERED.**

Bristow Marchant
United States Magistrates Judge
Columbia, South Carolina
*September 22,2004*

# SUPPLEMENTAL REPORT AND RECOMMENDATION JANUARY 5, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

| | |
|---|---|
| PAUL I. SHUMPERT,) | |
| | ) |
| Plaintiff. | ) C/ANo 3:00-2480-22BD |
| | ) |
| | )SUPPLEMENTAL |
| V. | )REPORT AND |
| | )RECOMMENDATION |
| | ) |
| MANCOR CAROLINA) | |
| , INC., | ) |
| | ) |
| Defendant. | ) |

This action has been filed by the Plaintiff against the Defendant pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, asserting a claim of age discrimination. In a Report and Recommendation filed March 10. 2004. the undersigned recommended that a motion for summary judgment filed by the Defendant in this action be granted, and chat this case be dismissed. Subsequently, in an order issued July 6, 2004, the Honorable Cameron McGowan Currie, United States

District Judge, recommitted this matter to the undersigned with instructions. As part of that order, Judge Currie referenced two affidavits filed by the Plaintiff, and noted that a decision would need to be made as to whether the Court should consider these affidavits or whether the Defendant's pending motion to strike these affidavits should be granted. The undersigned thereafter denied Defendant's motion to strike these affidavits in an order issued September 22,2004. However, as defense counsel had not previously been aware of the existence of one of these affidavits, and had only received the second affidavit as part of Plaintiff's objections to the previously issued Report and Recommendation, the undersigned also reopened the discovery period for the sole purpose of allowing a supplemental deposition of the Plaintiff on the issues raised in These affidavits. This deposition was to be completed within thirty (30) days of the date of that order, with the Defendant thereafter being allowed to supplement its memorandum in support of summary judgment within fifteen (15) days of its receipt of (he transcript from Plaintiffs reopened deposition. Plaintiff was then to file a response memorandum within fifteen (15) days following Plaintiffs counsel's receipt of Defendant's supplemental brief.

Pursuant to these instructions, a supplemental deposition of the Plaintiff was taken on October 15, 2004, following which Defendant filed a supplemental memorandum in support of its motion for summary judgment on November 16, 2004. Defendant's supplemental memorandum contains a certificate of mailing showing service of the supplemental memorandum on counsel for the Plaintiff; however, no

response memorandum from the Plaintiff was filed This matter is now ready for disposition by the Court.1

## Discussion

Plaintiff, a former employee of the Defendant Mancor Carolina, Inc., asserts that he was discriminated against on the basis of his age when he was terminated following an altercation at work with a younger co-worker. The younger co-worker was not disciplined. The facts (considered

'This case was automatically referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(l)(A) and (B) and Local Rule 73,02(B)(2)(g), D.S.C. The Defendant has filed a supplemental memorandum in support of summary judgment. As this is a dispositive motion, this Report and Recommendation is entered for review by the Court.

In the light most favorable to the Plaintiff) and the applicable caselaw are set forth in The Report and Recommendation filed March 10, 2004, a copy of which is attached hereto and incorporated herein. In that Report and Recommendation, the undersigned concluded that Plaintiff had failed to present evidence sufficient to create a genuine issue of material fact as to whether he was the victim of age discrimination to avoid summary judgment, and that this case should therefore he dismissed. In her order recommitting this matter to the undersigned, Judge Currie instructed the undersigned to 1) compare the nature of the events for

which Lloyd (the younger individual with whom Plaintiff got into a fight leading to Plaintiffs termination) was previously disciplined to the incident for which Plaintiff was terminated, as well as Lloyd's conduct as compared to Plaintiffs in the specific incident which precipitated Plaintiffs termination; 2) address the impact, if any, of Plaintiff s October 16, 2001 affidavit wherein he asserts that the supervisor who terminated him had been asking him twice weekly for three (3) months when he planned lo retire, and 3) address the impact of Plaintiff s supplemental affidavit (submitted with his objections to the Report and Recommendation) wherein he asserts that the individuals who hired him had left the company by the time Plaintiff was terminated.

I.

With respect to the previous incidents involving Lloyd, and comparing them to Plaintiffs conduct during the incident which led to his termination, the record shows that Lloyd was involved in an altercation with employee Melvin Sanders on March 14, 1997, during which Lloyd had yelled profanity at Sanders and pushed him. Lloyd did not deny having pushed Sanders on that occasion; therefore, that would have been a fact of which (he Defendant had knowledge, and not a disputed allegation. Both employees were counseled as a result of that incident, told that their

3behavior was unacceptable, and advised that such conduct would not be tolerated in the future and if repeated would lead to termination. See Lloyd Deposition. Exhibit 2. See also Lloyd Deposition, pp. 32-33. Lloyd had also been involved in a previous

altercation with the Plaintiff on April 15, 1998, during which Lloyd had grabbed Plaintiff by the arm. Following a conference between Lloyd, the Plaintiff, Supervisor Mary Ann Gate, and Plant Manager Dilip Teppara, no action was apparently taken. Lloyd Deposition, Exhibit 1. See also Lloyd Deposition, p. 26. In fact, it is clear from the record that Plaintiff and Lloyd had a history of run-ins and confrontations, with Plaintiff having accused Lloyd of picking him up off of a truck and of even having "keyed" his car See generally, Schnipke Deposition, pp. 26-30, 38-42. Plaintiff also testified about another incident Lloyd was involved in with an employee named Carroll Watkins. Plaintiffs Deposition, pp. 48-50.

As for the incident which led to Plaintiffs termination, while Plaintiff contends that Lloyd started the confrontation and was grabbing and shoving him first, the testimony of both Plaintiffs Supervisor. Duane Schnipke, as well as Plant Manager Teppara, was that they only personally witnessed the Plaintiff striking Lloyd. Both of these supervisors testified that they saw the Plaintiff strike Lloyd, but did not see what had happened prior to their arriving on the scene. Both testified that if they had seen Lloyd strike the Plaintiff, he would have also been terminated. Schnipke Deposition, pp. 11,49-50: Teppara Deposition-, pp. 10,33.

In the Report and Recommendation of March 10, 2004, the undersigned determined that Plaintiff had presented sufficient facts, when considered in the light most favorable to him, to create a genuine issue of fact as to whether he was treated differently from a similarly situated nonprotected employee (Lloyd), Report and Recommendation, at pp. 6-8. That

continues to the conclusion reached by the undersigned based on the evidence presented. The evidence shows that Lloyd and the Plaintiff had a history of confrontations with each other, including at least one altercation where Lloyd had "grabbed" the Plaintiffs wrist.2 Lloyd also had a history of physical confrontations with at least one other employee, following which he was specifically warned that if he engaged in such conduct again he would be subject to termination. That incident occurred prior to an April 1998 incident between Lloyd and the Plaintiff, where Schnipke testified that Lloyd had pulled Plaintiff off of a truck when Plaintiff was looking at some parts, as well as another incident where Lloyd and the Plaintiff had to be physically restrained and separated. Schnipke Deposition, pp. 31,71. Although both supervisors testified that striking another employee was a firing offense, and that Lloyd would have been treated just like the Plaintiff if they had observed him strike the Plaintiff, Lloyd was not fired (or even apparently disciplined apart from verbal warnings) when he had previously pushed Sanders or grabbed the Plaintiff.3

As for the incident of August 3,2001, although both Schnipke and Teppara testified that they did not personally see Lloyd strike the Plaintiff, while they did see Plaintiff strike Lloyd, Plaintiff testified that he was struck by Lloyd and had told his supervisors that Lloyd was the

2 A second incident, where Lloyd purportedly picked Plaintiff up to move or throw him off a truck, was apparently based only on Plaintiffs allegation, although it is not clear whether management contests that this event

occurred. See Schnipke Deposition, pp. 33,71
3 Teppara, who made the decision to terminate Plaintiffs employment in 2001, was also Plaintiffs and Lloyd's manager in 1998, and, although Teppara was not the manager in 1997, he would have had knowledge of Lloyd's conduct in that 1997 incident in both 1998 and 2001. See Plateau v. South Carolina Com'n for the Blind, No. 02-1308, 2002 WL 31553805 at * (4th Cir. Nov. 19,2002) [Employees may be deemed similarly situated where the same supervisor has been involved in other employment decisions to which Plaintiff seeks to compare his treatment.]; Heyward v. Monroe, No. 97-2430, 1998 WL 841494 at **2 (4th Cir. Dec. 7, 1998), cert. denied, 527 U.S. 1036 (1999); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 802 (6th Cir. 1994)[plaintiff must prove that all relevant aspects of employment situation are nearly identical]; Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992); Nishi v. Siemens, 290 F.Supp.2d 772, 782 (E.D.Mich. 2003).

instigator of the incident. Plaintiffs Deposition, pp. 31-33,36. Lloyd also had the previously cited history of being involved in physical confrontations with fellow employees which included striking or shoving or grabbing those employees. However, he was not even disciplined as a result of this incident, while the Plaintiff was fired.

Considered in the light most favorable to the Plaintiff, a reasonable factfinder could construe these facts as evidence that a similarly situated individual from outside of Plaintiffs protected class had received more favorable treatment from management. Cf. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997) ["In determining whether employees are similarly situated for purposes of establishing a prima

facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways."]; Frazier v. Dept of Labor, No. 01-198, 2003 WL 21254424, at *2(S D.Ind March 4, 2003) ["In deciding whether another employee is similarly situated to the plaintiff, the court must consider all relevant factors, the number of which depends on the context of the case."] (quoting Patterson v. Avery Dennison Corp., 281 F.3d 676, 680 (7th Cir. 2002)); see Texas Dept. of Community Affairs, 450 U.S. at 253 [The burden of establishing a prima facie case is not onerous.]; see also Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991) [when considering whether a Plaintiff has presented a prima facie case under the McDonnell Douglas proof scheme [set out in McDonnell Douglas] that [it] forgets that the scheme exists solely to facilitate determination of 'the ultimate question of discrimination *vel non*.'."].

## II.

With respect to the two affidavits submitted by the Plaintiff, a review and consideration of these affidavits does not change the undersigned's ultimate conclusion that Plaintiff has failed to present sufficient evidence to create a genuine issue of fact that the non-discriminatory reasons given for his termination were pretextual or that the Defendant's decision was in actuality motivated by age animus.

In the first affidavit (Plaintiffs affidavit of October 16: 2001), Plaintiff attests that during the three (3) months prior to his termination Schnipke would ask him. at least twice a week, when he was

planning to retire. Plaintiff attests that he told Schnipke that he was not planning to retire. This general and conclusory statement alone is not in and of itself sufficient evidence that Plaintiffs termination following his altercation with Lloyd on August 3, 2001 was motivated by age discrimination to survive summary judgment. The evidence shows that Plaintiff had been working for the Defendant since he had been rehired in 1997 at age 64. Although Schnipke and Teppara were not involved in the 1997 decision to rehire the Plaintiff, Schnipke had been Plaintiffs supervisor since 1998, and Plaintiff testified at his July 3, 2001 deposition that he had had no problems with Schnipke and that they got along well. Plaintiffs Deposition, p. 20. Plaintiff also testified that he got along well with the other supervisors at the plant, including Teppara, who had been Plaintiffs Manager for over three years. Id, at pp. 20-21; Teppara Deposition, p. 34. Further, while Schnipke recommended to Teppara that Plaintiff be terminated following his altercation with Lloyd on August 3, 2001, it was Teppara who actually made his decision to terminate Plaintiffs employment, Schnipke Deposition, p. 71; Teppara Deposition, pp. 17, 35-36. Plaintiff has made no allegations of any age based comments or animus by Teppara, with whom he said he had "no problems". Plaintiffs Deposition, p. 22. Under these facts, even assuming that Schnipke had asked the Plaintiff if or when he was going to retire, these comments standing alone do not show the necessary pretext under the applicable case law to survive summary judgment. Cf. Ziegler v. Beverly Enterprises-Minnesota, Inc., 133 F.3d 671, 676 (8th Cir. 1998) ["We do not think that suggesting

retirement to an employee who is eligible for retirement provides a reasonable basis for inferring age discrimination."]. see also Monaco v. Fuddruckers, Inc. 1 F.3d 658. 660 (7th Cir, 1993) [supervisor's repeated age-based remarks insufficient to preclude summary judgment for the employer absent a showing that they were "related to the employment decision in question"]; cf. Smith v. The Thresholds, No. 97-7234, 1999 WL 410030 at *7 (N.D.Ill. May 27, 1999) ["Evidence of a decision maker's occasional or sporadic derogatory comments about an employee's age is generally insufficient, without more, (o establish an ADEA claim."]. At his supplemental deposition taken on October 15, 2004, Plaintiff directly contradicted his previous deposition testimony, testifying that, after Schnipke became his supervisor, he was treated unfairly. Plaintiffs Supplemental Deposition, at p. 5. However, Plaintiff may not create a genuine issue of fact by offering inconsistent or contradictory testimony. Barwick v. Celotex Corp.. 736 F.2d 946, 960 (4th Cir. 1984) ["A genuine issue of material fact is not created where the only issue of fact is to determine which of die two conflicting versions of the Plaintiffs testimony is correct."]; Rohrbough v. Wyeth Laboratories. Inc.. 916 F.2d 970 (4th Cir. 1990) ["if a party who has been examined at length on deposition could raise an issue of fact simply by submitted an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact"] (quoting Barwick 736 F.2d at 960), Darnell v. Target Stores. 16 P.3d 174 (7th Cir. 1994). In any event, even at his supplemental deposition Plaintiff conceded that he

never made any complaints about Schnipke to anybody else, and even with respect to discussions Plaintiff testified that he had with Schnipke, Defendant correctly points out in its supplemental memorandum that these conversations concerned work loads, the process of getting the work out, and other such issues. Nowhere in even, this revised testimony does Plaintiff make any claim that Schnipke made any age based comments to him, or indicated any age animus, gee generally. Plaintiff's Supplemental Deposition, at pp 6-7.

Finally, in Plaintiffs affidavit of March 23, 2004, Plaintiff attests that he was hired by one set of managers but was fired by another. This affidavit was apparently submitted to address a statement made by the undersigned in the initial Report and Recommendation that Plaintiff had failed "to explain why individuals who were willing to hire and retain someone of a relatively advanced age such as himself would suddenly decide to terminate him because he was too old." Report and Recommendation, at p. 10. However, even assuming that neither Schnipke or Teppara was responsible for hiring the Plaintiff, Plaintiff had nevertheless continued to work under both Schnipke and Teppara after they became his supervisors for several years prior to his termination without any allegations of age based animus on the pan of either of these two supervisors, notwithstanding his relatively advanced age during those years. Hence, while neither of these supervisors initially hired me Plaintiff, they certainly retained him for several years of employment, and Plaintiff has again failed to offer any explanation as to why these two individuals would have retained someone of a

relatively advanced age such as the Plaintiff for several years, and then suddenly decide to terminate him because of his age.

Therefore, as set forth herein and for the reasons previously set forth in the Report and Recommendation of March 10, 2004, the undersigned continues to conclude that Plaintiff has failed to present evidence of pretext sufficient to survive Defendant's summary judgment motion, and that his claim should therefore be dismissed.

## Conclusion

Based on the foregoing, it remains the recommendation of the undersigned that the Defendant's motion for summary judgment be **granted**, and that this case be **dismissed**.

Bristow Marchant
United States Magistrate Judge

Columbia, South Carolina
January 5, 2005

# ORDER OF JANUARY 27, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

| | | |
|---|---|---|
| PAUL L. SHUMPERT, | ) | |
| | ) | |
| Plaintiff, | ) | C/A No. 3:00-2480-22BD |
| | ) | |
| | ) | **ORDER** |
| V. | ) | |
| | ) | |
| MANCOR CAROLINA, INC., | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | |

Plaintiff filed this action against his former employer alleging age discrimination. Defendant filed a motion for summary judgment. In accordance with this court's order of reference and 28 U.S.C. § 636(b), this matter was referred to United States Magistrate Judge Bristow Marchant for a Report and Recommendation ("Report"). The matter is presently before the court on Plaintiffs objections to Magistrate Judge Marchant's Report (entered January 6, 2005), which recommended that Defendant's motion be granted in full.

This court is charged with making a de novo determination of any portion of the Report, and Recommendation of the Magistrate Judge to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the

recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. See 28 U.S.C. § 636(b)

The court has carefully reviewed Plaintiff's objections, the Report, and all related documents. The court finds that the concerns raised by Plaintiff's objections are adequately and correctly addressed by the Report and agrees with the recommendation of the Magistrate Judge. Accordingly, the Report and Recommendation of the Magistrate Judge is adopted and incorporated by reference.

IT IS HEREBY ORDERED that judgment be entered in Defendant's favor un all claims.

IT IS SO ORDERED,

CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

uth Carolina
005

# UNPUBLISHED OPINION SEPTEMBER 13, 2005

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05-1161

PAUL L. SHUMPERT,

Plaintiff - Appellant,

versus

MANCOR CAROLINA, INCORPORATED,

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Cameron McGowan Currie, District Judge. (CA-00-2480-3)

Submitted: August 29, 2005 Decided: September 13, 2005

Before WILKINSON, LUTTIG, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Chalmers C. Johnson, CHALMERS JOHNSON LAW FIRM, Charleston, South Carolina, for Appellant. Vincent A. Sheheen, SAVAGE, ROYALL & SHEHEEN, L.L.P., Camden, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Paul L. Shumpert appeals the district court's order accepting the revised report and recommendation of the magistrate judge and granting summary judgment to the Defendant in this employment discrimination action. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Shumpert v. Mancor Carolina, Inc., No. CA-00-2480-3 (D.S.C. filed Jan. 27, 2005 & entered Jan. 28, 2005). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument

would not aid the decisional process.

AFFIRMED